



GAIL FARBER, Director

COUNTY OF LOS ANGELES

DEPARTMENT OF PUBLIC WORKS

"To Enrich Lives Through Effective and Caring Service"

900 SOUTH FREMONT AVENUE
ALHAMBRA, CALIFORNIA 91803-1331
Telephone: (626) 458-5100
<http://dpw.lacounty.gov>

ADDRESS ALL CORRESPONDENCE TO:
P.O. BOX 1460
ALHAMBRA, CALIFORNIA 91802-1460

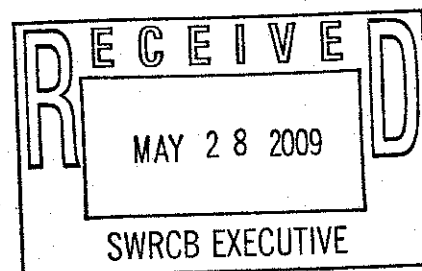
IN REPLY PLEASE

REFER TO FILE:

WM-9

May 28, 2009

Ms. Jeanine Townsend, Clerk
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Dear Ms. Townsend:

WATER QUALITY ENFORCEMENT POLICY WORKSHOP ON JUNE 4, 2009

The County of Los Angeles Department of Public Works, on behalf of the County of Los Angeles (County) and the Los Angeles Flood Control District, is pleased to submit the following preliminary comments on the State Water Resources Control Board's (State Board) Draft Water Quality Enforcement Policy dated May 6, 2009 (Draft Policy). We commend the State Board's efforts to develop an enforcement policy that will provide more predictability and consistency in the assessment of administrative penalties by the Regional Water Quality Control Boards (Regional Boards). We understand and expect that there will be further opportunities for public comment before the Draft Policy is presented to the State Board for adoption.

We share the State Board's goal of protecting and improving water quality, and the County has invested heavily in programs and infrastructure in furtherance of that goal. We have partnered with the Regional Boards and the State Board to achieve practical solutions to daunting water quality problems – problems made even more difficult to address by the historic economic crisis now confronting our country. Now, more than ever, we believe the State Board should emphasize "[t]ools such as providing assistance, training, guidance and incentives" which the Draft Policy acknowledges "work very well in many situations." (Draft Policy, Page 1). The "more forceful approach" of an enforcement action cannot break through technology barriers, practical realities, and funding constraints. We suggest the Draft Policy recognize that a cooperative approach is essentially the only approach for especially challenging water quality issues such as urban runoff control.

The Draft Policy Should Distinguish Between Public Entities and Private Entities

We respectfully submit that the Draft Policy should be modified to distinguish between public entities and private entities in making enforcement decisions. This distinction should inform the prioritization of enforcement actions, the amount of proposed penalties, and the availability and extent of Supplemental Environmental Projects. Unlike private entities, for public entities there is no profit motivation to maximize returns to shareholders by minimizing environmental compliance costs. Rather, all fiscal decisions by public entities are made with one goal: to maximize the public benefit provided by limited public financial resources, almost always to provide crucial public services that cannot be provided by any other entity. This balancing of limited resources for the public good cannot be compared to the profit-maximizing motivations of private entities, and that difference should be emphasized in the next version of the Draft Policy.

Penalty Assessment Alternatives 1 and 2

The State Board has asked the public to indicate whether it would prefer the State Board to adopt the Penalty Calculation Methodology (Alternative 1) or the Monetary Liability Recommendation Panel (Alternative 2) for assessing administrative penalties. However, the Note on Page 26 of the Draft Policy indicates that "[i]f the concept of Alternative 2 is preferred as a replacement to the above methodology [Alternative 1], many elements described above, such as "Economic Benefit" and "Ability to Pay," will be rewritten to provide policy and guidance to this second alternative." This statement implies that not all of the ten steps and other provisions of Alternative 1 would be adapted to Alternative 2. For that reason, it is not possible to meaningfully comment on Alternative 2 without knowing what policies and guidance the Monetary Liability Recommendation Panel would apply.

In general, we believe that the Monetary Liability Recommendation Panel would be unlikely to significantly improve water quality enforcement policy. Rather than having more people review proposed Administrative Civil Liability Complaints, what is needed are clear and understandable policies to guide enforcement staff in deciding the appropriate penalty for a given violation. As explained below, while we understand that Alternative 1 attempts to provide such policies, the multistep analysis is insufficiently defined to provide meaningful guidance to either enforcement staff or the regulated community.

Penalty Calculation Methodology (Alternative 1)

We support the general concept embodied in the Alternative 1, that is, to provide specific guidance to enforcement staff and the regulated community regarding the amount of civil liability that should be proposed for particular violations. Unfortunately, in spite of the multiple steps and factors in Alternative 1, the methodology remains vague.

In order for the public to meaningfully assess the impact of Alternative 1 on proposed civil penalties, the State Board must evaluate the effect application of Alternative 1 would have on real world violations, both in terms of magnitude and consistency. We recommend that the State Board analyze orders imposing discretionary civil penalties over the last several years and determine, for those violations, what civil penalty would be recommended under Alternative 1. This is the only way the public and the State Board, for that matter, can determine how application of Alternative 1 would affect proposed civil penalties. Currently it is not possible to determine, based on the listed steps and factors of Alternative 1, whether its application would result in generally higher or lower civil penalties. The regulated community and the general public need to know if proposed penalties would be higher under this new policy.

The State Board is in the best position to analyze how imposition of Alternative 1 would affect proposed civil penalties as compared to current practice. Indeed, we respectfully suggest that it is incumbent upon the State Board to do so.

We also offer the following specific comments on other aspects of Alternative 1:

1. Under Step 4 of Alternative 1, the Regional Boards should limit their review of a discharger's history of violations to violations that occurred during the previous five years. This five-year time period is consistent with the United States Environmental Protection Agency's Clean Water Act Civil Penalty Policy.
2. A maximum amount of much less than \$2.00 per gallon should be used to assess civil penalties for municipal stormwater violations for the following reasons: the maximum per gallon amount for releases of municipal stormwater under Step 2 of Alternative 1 should be less than the maximum per gallon amount for sewage spills and releases of stormwater from construction sites.

The volume of water discharged from municipal storm sewers is vastly greater than even the largest sewage spills, but stormwater has fewer contaminants. The amount of stormwater discharged from construction sites is very small by comparison. Furthermore, the operators of sanitary sewer collection systems and construction sites have more control over the entry of pollutants into their discharge.

3. There is an overall lack of examples to indicate how the various factors in Alternative 1 should be applied. For instance, Step 1, Factor 1, is designed to rate "Harm or Potential Harm to Beneficial Uses" on a 0-5 scale. There is little in the way of examples, however, of how various types of violations would rate on the scale. There is no way to know how "observed, but minor" impacts to aquatic life differ from "observed impacts," "observed and substantial impacts," and "significant impacts." This impacts analysis does not evaluate whether the aquatic life impacted is sensitive and relatively high valued, such as native species in an estuary, or relatively lower valued, ubiquitous, and resilient species such as carp in drainage channel.

Beach closures are proposed as another metric, but under the policy, closing 100 yards of a single beach would merit the same rating as a closure of 60 miles of beaches; an impact to beneficial uses is treated the same irrespective of the geographic extent. Similarly, there is no distinction between precautionary beach closures made without any analytical basis and beaches that are closed because of actual exceedances of water quality objectives. There is also no distinction between beach closures during high-use summer months and lower-use winter months.

There is a similar lack of guidance with regard to the application of the adjustment factors in Step 4. Under the Culpability factor, for example, there is no guidance on how the multiplier should be applied. Observance of prevailing industry practices might justify a fractional multiplier, no multiplier (a value of 1.0), or something else. It is impossible to discern the State Board's intent from the existing Draft Policy.

Without more concrete guidance about how these differences between violations should be treated in a penalty analysis, the Draft Policy provides little improvement over an ad hoc case-by-case analysis.

Ms. Jeanine Townsend
May 28, 2009
Page 5

Thank you for your consideration of our comments and recommendations. We look forward to continuing and expanding our partnership with the State Board and Regional Boards to protect and improve the quality of California's water. We believe that the comments in this letter will help to make better enforcement decisions that properly balance the competing priorities at issue in any enforcement decision.

If you have any questions or would like to discuss our comments further, please call me or your staff may contact Mr. Frank Wu at (626) 458-4358 or fwu@dpw.lacounty.gov.

Very truly yours,

GAIL FARBER
Director of Public Works

A handwritten signature in cursive script, appearing to read "Mark Pestrella".

MARK PESTRELLA
Assistant Deputy Director
Watershed Management Division

MS:jtz
P:\wmpub\Secretarial\2009 Documents\Letters\After 3_20_09\WQ Enforcement Policy Comment.doc\09272